

83-1049

Office-Supreme Court, U.S.

FILED

DEC 24 1983

ALEXANDER L. STEVAS,
CLERK

No.

**In The
Supreme Court of the United States
October Term, 1983**

JOSE HARARI, SALVADOR HARARI and RENEE HARARI,
Petitioners,

v.

BACHE HALSEY STUART SHIELDS, INCORPORATED,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME
COURT OF THE STATE OF NEW YORK**

STEPHEN HOCHBERG
Counsel for Petitioners
30 Beekman Place
New York, N.Y. 10022
(212) 832-3543

Dick Bailey Printers,

203 Richmond Avenue ■ Staten Island, New York 10302

Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTION PRESENTED

Is the due process clause of the Fourteenth Amendment of the United States Constitution, as delineated in International Shoe Co. v. Washington, 326 U.S. 310 (1945), violated when the State of New York asserted in personam jurisdiction over Petitioners who are Mexican nationals and residents, who opened a non-discretionary account with Respondent, a non-New York corporation, in Texas, and whose only communications with Respondent took place in Texas; based upon the Petitioners maintaining inactive bank and brokerage accounts in New York, unrelated to the transaction, and interposing counterclaims in the action?

PARTIES TO THE PROCEEDING
IN THE COURT WHOSE JUDGMENT
IS SOUGHT TO BE REVIEWED

1. JOSE HARARI
2. SALVADOR HARARI
3. RENEE HARARI
4. BACHE HALSEY STUART SHIELDS,
INCORPORATED

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	2
Jurisdiction	3
Statement of the Case	4
Reasons for Granting the Writ	15
The decisions by the New York State Courts are in conflict with this Court's decision in <u>International Shoe Co. v. Washington</u>	
Conclusion	27
<u>Appendix</u>	
Order of the New York State Court of Appeals denying leave to appeal	1a
Order of the New York State Court of Appeals dismissing the appeal, <u>sua sponte</u>	2a

	<u>Page</u>
Order of the Appellate Division, First Department, of the Supreme Court of the State of New York affirming the judgment of the Supreme Court of the State of New York, County of New York	3a
Judgment of the Supreme Court of the State of New York, County of New York in favor of Respondents	5a
Decision of the Supreme Court of the State of New York, County of New York awarding judgment in favor of Respondents	8a
Order of Blangiardo confirming order of attachment	17a
Decision of the Supreme Court of the State of New York, County of New York, confirming the <u>ex parte</u> order of attachment	20a
<u>Ex parte</u> order of attachment of the Supreme Court of the State of New York, County of New York	22a

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
American Express Co. v. Levee, 263 U.S. 19 (1923)	3
Ames v. Senco Products, Inc., 1 App. Div. 2d 658 (1st Dep't 1955)	20
Amigo Foods Corp. v. Marine Midland Bank, 39 N.Y.2d 391 (1976)	19
Drexel Burnham & Co. v. Silverman, 75 Misc. 2d 904 (Civ. Ct. N.Y. Cty. 1973)	21, 22
Fremay, Inc. v. Modern Plastic Machinery Corp., 15 App. Div. 2d 235 (1st Dep't 1961)	19
Haar v. Armandaris Corp., 31 N.Y. 2d 1040 (1973)	24
Hanson v. Denckla, 357 U.S. 235 (1958)	23
Hastings v. Piper Aircraft Corp., 275 App. Div. 435 (1st Dep't 1948)	19
Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418 (Civ. Ct., N.Y. Cty. 1967)	21, 22
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	7, 14, 15, 18 25, 26
Longines Wittnauer Co. v. Barnes and Reinecke, Inc., 15 N.Y.2d 443 (1965)	23

<u>Cases (cont'd)</u>	<u>Page</u>
Majique Fashions Ltd. v. Warwick & Co. Ltd., 96 Misc. 2d 808 (Sup. Ct. N.Y. Cty. 1978)	20
Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Alexiou, 397 F. Supp. 1292 (S.D.N.Y. 1975)	16, 24
Nemetsky v. Banque De Developp- ment, 48 N.Y.2d 962 (1978)	19
Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13 (1970)	24
Pennoyer v. Neff, 95 U.S. 714 (1877)	15
Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917)	18
<u>Statutes</u>	
U.S. Constitution, Fourteenth Amendment	i, 13, 26
N.Y. CPLR 301	16, 18, 21, 2
N.Y. CPLR 302	15, 16, 18, 2 24, 25, 2
N.Y. CPLR 5514(a)	3

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI,

Petitioners,

v.

BACHE HALSEY STUART SHIELDS,
INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DIVISION, FIRST
DEPARTMENT, SUPREME COURT OF THE
STATE OF NEW YORK

STEPHEN HOCHBERG
30 Beekman Place
New York, N.Y. 10022

(212) 832-3543

Counsel for Petitioners

OPINIONS BELOW

The order of the New York State Court of Appeals denying leave to appeal has not yet been reported.

The order of the New York State Court of Appeals dismissing the appeal, sua sponte, has not yet been reported.

The order of the Appellate Division, First Department, of the Supreme Court of the State of New York, affirming the judgment of the Supreme Court of the State of New York, County of New York, is reported at ___ App. Div. ___, 461 N.Y.S.2d 662 (1st Dep't 1983).

The judgment and decision of the Supreme Court of the State of New York, County of New York, have not been reported.

The ex parte Order of attachment and the order and decision of the Supreme Court of the State of New York, County

of New York, confirming the ex parte order of attachment has not been reported.

All of the above are included in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The order of the Appellate Division, First Department, of the Supreme Court of the State of New York was entered on March 29, 1983. A timely filed notice of appeal to the Court of Appeals of the State of New York was dismissed, sua sponte, by that Court on June 16, 1983. A timely filed motion for leave to appeal to the Court of Appeals of the State of New York (N.Y. CPLR 5514(a)) was denied on September 29, 1983, and this petition for certiorari was filed within 90 days of that date. American Railway Express Co. v. Levee, 263 U.S. 19 (1923).

STATEMENT OF THE CASE

This action was commenced by Respondent Bache Halsey Stuart Shields Incorporated ("Bache") to recover a deficit balance allegedly existing in Petitioners' commodities futures, securities and securities options accounts maintained with Bache. Bache's verified complaint consists of a single cause of action against the three defendants ("Hararis") in the amount of \$156,869.98 plus interest at Bache's prevailing margin loan rate from February 12, 1980.

Hararis' verified answer denied that there was a deficit balance owing to Bache and alleged a number of affirmative defenses and counterclaims. These included a lack of jurisdiction, failure to state a cause of action, breach of contract, unauthorized transactions, violation of Federal Securities and Commodities laws, violation of statutory

and common law, public policy, negligence, fraud, breach of warranty, breach of fiduciary duty, exemplary damages, conversion and an accounting. The Hararis by way of counterclaim sought compensatory damages in the amount of \$400,000.00 for losses sustained in their accounts and exemplary damages of \$1,500,000.00.

Bache's verified reply consists of a general denial of the allegations of Hararis' counterclaims and several affirmative defenses.

On February 15, 1980, Bache obtained an ex parte order of attachment in the Supreme Court of the State of New York, County of New York, against certain property belonging to Petitioners situated in the State of New York. By order to show cause signed on February 20, 1980, plaintiff moved to confirm the ex parte order of attachment. By

affidavits dated March 6 and March 10, 1980, Petitioners opposed the confirmation of the ex parte order of attachment and requested that the order be vacated on the ground that the court lacked jurisdiction over the Petitioners, that the Respondent had failed to show a probability of success on the merits of their case, and that the defendants possessed valid counterclaims.

On or about March 19, 1980, the motion to confirm and the "cross-motion" to vacate the ex parte order of attachment were submitted to the Honorable Frank J. Blangiardo, who rendered a decision on April 8, 1980. Finally, on April 22, 1980, an order was signed by the Honorable Frank J. Blangiardo granting Respondent's motion to confirm the ex parte order of attachment and denying Petitioners' denominated cross-motion to vacate the ex parte order of attachment.

In his decision, Justice Blangiardo brushed aside Petitioners' contention that the court lacked jurisdiction over them and stated

The attachment in this case does not offend "traditional notions of fair play and substantial justice" (see International Shoe Co. v. Washington, 326 U.S. 310) since the defendants have established purposeful contacts with this jurisdiction in maintaining bank accounts and having transactions carried out for them on the New York Commodities and Stock Exchanges.

During the pendency of the motion to confirm and the cross-motion to vacate the ex parte order of attachment, Petitioners served their answer to the complaint, in which is set forth as a fourth affirmative defense that the Petitioners were residents of Mexico, that Respondent is a foreign corporation with its principal place of business in

New York City, that the Petitioners have no contact with the State of New York other than the maintenance of certain bank accounts totally unrelated to the transactions sued upon in the complaint, that Respondent had improperly attempted to assert in personam jurisdiction over the Petitioners by attaching their assets, and that the court therefore did not have jurisdiction over the Petitioners.

At the conclusion of the trial, the court determined that it did have in personam jurisdiction over the Petitioners based upon the following facts: that the Petitioners had various securities and commodities dealings with the Respondent in New York over a significant period of time; that the Petitioners agreed that "they would be governed by the laws of the State of New York"; that as a basis

for securing credit from the Respondent the Petitioners referred the Respondent to their business relationship which they had maintained for some time with the Chase Manhattan Bank; that one of the Petitioners had come to New York at various times to conduct several financial undertakings; that the other Petitioners visited New York City in 1979 to open an (unrelated) account with the brokerage firm of Merrill, Lynch, Pierce, Fenner & Smith; that one of the Petitioners also opened an (unrelated) account with Citibank in New York City consisting of a checking account and a certificate of deposit in excess of \$100,000; and that Petitioners have affirmatively used New York as a forum for litigating their claims (by way of counterclaim) against Respondent.

It is uncontroverted that all of the contacts between the Hararis and Bache were at Bache's office in San Antonio, Texas. The only connection adduced at trial between the Hararis, Bache and New York was that the monthly statements were prepared in New York and mailed directly to the Hararis in Mexico; that the margin loans for securing trading in the Hararis' account were arranged through Bache's New York office (not at the Hararis direction or request); and that Bache had selected the New York COMEX for the execution of the Hararis' orders. All confirmation slips for individual transactions, however, were sent from the San Antonio office.

As to Bache's selection of the New York COMEX for the execution of the Hararis' orders, it is most significant

to note that when the Hararis opened their account with Bache there was no discussion as to where or on what exchanges stocks and commodities were to be traded; that the Hararis never directed that any of their futures contracts be purchased on the New York COMEX; and that Bache was at all times free to execute any orders on the New York COMEX, the Chicago Commodities Exchange, the London Exchange, or any other exchange in which the Hararis' orders could be executed.

With respect to any bank accounts maintained by the Hararis in New York, the testimony at trial revealed that on May 20, 1975 a time deposit account was opened at Chase Manhattan Bank in the names of Jose and/or Salvador Harari, a savings account was opened in the name of Jose and/or Renee Harari on April 29,

1977, and a checking account was opened in the names of Jose and Salvador Harari on May 20, 1975. With respect to the time deposit account at Chase Manhattan Bank, it should be noted that it was opened with a \$100,000 deposit but that there were no additional principal deposits made after the account was first opened on May 20, 1975. The savings account referred to above was opened with a \$3,100 deposit on April 29, 1977 and no additional deposits were made. The initial deposit for the checking account in May of 1975 was \$1,000 and there were either no other deposits made or one other small deposit made into that account.

The evidence also reveals conclusively that the Hararis were Mexican citizens who had never lived in any other country.

Thus, with respect to the period of time during which the Bache account was maintained, between May of 1978 and February of 1980, the only connections between the Hararis and New York were the bank accounts referred to previously, that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit, and that in September of 1979 he opened a securities account in New York with Merrill, Lynch, Pierce, Fenner & Smith.

The Hararis were thus compelled to defend this action in a jurisdiction thousands of miles from their residence; with which they had no contact relating to the transactions of the lawsuit; despite their timely and repeated objection; in violation of the due process clause of the Fourteenth

Amendment, as delineated by this Court
in International Shoe Co. v. Washington,
326 U.S. 310 (1945).

REASONS FOR GRANTING THE WRIT

The decisions by the New York State Courts are in conflict with this Court's decision in International Shoe Co. v. Washington.

This Court delineated the in personam jurisdiction of the various states over non-residents in its decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The necessity to be physically present, Pennoyer v. Neff, 95 U.S. 714 (1877), gave way to a requirement that a non-physically present defendant only have sufficient contacts with the State attempting to assert in personam jurisdiction over him so as not to offend traditional notions of fair play and substantial justice.

The doctrine in International Shoe was later codified in New York in CPLR 302, the long arm statute. The same principle also applies to foreign

nationals under the law of comity. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Alexiou, 397 F. Supp. 1292 (S.D.N.Y. 1975).

Therefore, to obtain in personam jurisdiction over a defendant in a contract action, it must be shown that either the defendant is doing business in the State of New York (N.Y. CPLR § 301) or, pursuant to N.Y. CPLR § 302, that the defendant has transacted business within the State of New York and that the cause of action arose from such transaction of business.

Necessarily decisions relating to the appropriate application of sufficient contacts intertwine findings of fact on an ad hoc basis. This is not usually appropriate matter for review by this Court in the exercise of its discretion on granting writ of certiorari petitions.

This Petition, however, involves facts which have a national and international impact.

The Hararis, like so many others, are non-resident aliens, who have availed themselves of the services of a brokerage firm in Texas. One or more of them also had previously availed themselves, on a limited basis, of the services of banking institutions in New York. The action of New York to base in personam jurisdiction on the fact that various trades (which could have been made elsewhere), not made by request or direction of the Petitioners, were made on exchanges located in New York; and that one or more of the Petitioners maintained limited (in activity and amount) unrelated bank accounts in New York; offends the traditional concepts of fairness and substantial justice enunciated in

International Shoe and is, in particular regard to New York, a leading financial, banking and securities center, subject to frequent repetition.

The Hararis did not transact business in New York to subject them properly to N.Y. CPLR § 302(a)(1) jurisdiction in this transaction; nor did they "do business" in New York pursuant to N.Y. CPLR § 301 subjecting them to jurisdiction on any, even unrelated, causes of action.

The constitutionally proper test for determining whether a defendant is doing business in a State, as set forth by Justice Cardozo for New York in Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917), is that the defendant must do business "not occasionally or casually, but with a fair measure of permanence and continuity." Id. at 267. It is

apparent that the Hararis under any test were not doing business within the State of New York and thus were not subject to its jurisdiction under CPLR 301.

Even under New York law, it is well settled that the mere existence of bank accounts in New York is insufficient for a finding that a defendant is doing business in this State. See Nemetsky v. Banque De Developpment, 48 N.Y.2d 962 (1978), citing Amigo Foods Corp. v. Marine Midland Bank, 39 N.Y.2d 391 (1976); Fremay, Inc. v. Modern Plastic Machinery Corp., 15 App. Div. 2d 235 (1st Dep't 1961); and Hastings v. Piper Aircraft Corp., 274 App. Div. 435 (1st Dep't 1948). New York recognized that "there are policy considerations which suggest that New York, as a commercial and banking center, should not require a foreign corporation to

defend an action in New York solely on the basis of a bank account maintained here." Majique Fashions Ltd. v. Warwick & Co. Ltd., 96 Misc. 2d 808 (Sup. Ct., New York County 1978), rev'd on other grounds, 67 App. Div. 2d 321 (1st Dep't 1979), citing Ames v. Senco Products, Inc., 1 App. Div. 2d 658 (1st Dep't 1955). To require foreign nationals to submit to the jurisdiction of New York courts based upon such insignificant contacts would have a chilling effect on their maintaining banking relationships with New York financial institutions. Those foreign nationals not dissuaded and thus subjected to suit would impose a needless burden on that State's judicial resources. This point is highlighted in this case where foreign nationals, the Hararis, conducted relatively small to their means, non-primary banking activities in that State.

New York has also recognized that the trading of a defendant's stock accounts on a New York exchange, without more, is not sufficient for a finding that the defendant was doing business pursuant to CPLR 301 or transacting business pursuant to CPLR 302 within the State of New York. Drexel Burnham & Co. v. Silverman, 75 Misc. 2d 904 (Civ. Ct., New York County 1973); Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418 (Civ. Ct., New York County 1967). In both of the foregoing cases, trades were made by out-of-state stockbrokers for out-of-state residents on the New York Stock Exchange. As with the Kararis, no directions were given by the customers on which exchanges to make the trades. Those courts found that the conduct of the plaintiffs in executing the transactions on the New York Stock Exchange

was insufficient to confer in personam jurisdiction pursuant to CPLR 302(a)(1).

In this case there are even stronger reasons for holding that the execution by Bache of the Hararis' orders on the New York COMEX should not confer jurisdiction over the Hararis in the courts of that State. For in the Drexel Burnham and Hertz, Newmark cases, the customers, who were trading in stocks listed on the New York Stock Exchange, must have been aware when they gave the orders to the local out-of-state stockbrokers that the orders would be executed on the New York Stock Exchange. The Hararis, on the other hand, were primarily trading in gold futures, which could have been traded equally as well on the Chicago Commodities Exchange or on various European and Asian exchanges. Respondent unilaterally decided to execute the

orders on the New York COMEX, and at no time did the Hararis ever request or direct where the trades should be made. Thus, the Hararis cannot properly be subjected to in personam jurisdiction in New York because of Respondent's unilateral decision to trade on the New York COMEX. See Longines-Wittnauer Co. v. Barnes and Reinecke, Inc., 15 N.Y.2d 443 (1965), wherein the court, quoting Hanson v. Denckla, 357 U.S. 235 (1958), stated:

The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirements of contact with the forum state.... [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

15 N.Y.2d at 451-452, quoting 357 U.S. at 253.

It is well established in New York law that the actions of an agent, as Bache was herein with respect to the Hararis, cannot be attributed to its principal in a suit where the agent is seeking to assert personal jurisdiction over the principal. Haar v. Armandaris Corp., 31 N.Y.2d 1040 (1973); Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 19, n. 2 (1970); and Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Alexiou, 397 F. Supp. 1292, 1293 (S.D.N.Y. 1975).

The Hararis were not "doing business" in New York nor, for all the reasons set forth above, can the Hararis constitutionally be subject to the jurisdiction of New York pursuant to N.Y. CPLR § 302(a)(1) for causes of action arising out of the transaction of business within the State of New York. As discussed

supra, to constitutionally obtain jurisdiction over a defendant pursuant to a transaction of business under CPLR 302, it must be shown that the defendant transacted business within the State of New York and that the cause of action arose out of that transaction of business. Accordingly, the fact that the Hararis had maintained bank accounts in New York, that they had opened an account with the brokerage firm of Merrill, Lynch, Pierce, Fenner & Smith, and that they came into the jurisdiction on two or three occasions to conduct unrelated financial dealings, that their agent (Bache) unilaterally decided to transact trades on New York exchanges cannot, pursuant to the due process clause of the Fourteenth Amendment as delineated in International Shoe Co. v. Washington, confer in personam jurisdiction in New York, inasmuch as

Respondent's cause of action had nothing whatsoever to do with the above-described activities.

The courts of New York have strayed from their previous decisions interpreting the N.Y. CPLR §§ 301 and 302. This has created a situation in which Petitioners have been subjected in violation of the due process clause of the Fourteenth Amendment to in personam jurisdiction in New York. This case is in direct conflict with the doctrine delineated in this Court in International Shoe Co. v. Washington. This erroneous view of the New York courts has a potentially national and international scope in that New York, in particular, is a center of international finance, banking and securities trading. The activities which the New York courts improperly assert form the basis for subjecting

Petitioners to New York's jurisdiction are similar to the activities of tens of thousands of others who, if this decision goes unreviewed, would be subject to the same constitutionally improper exercise of in personam jurisdiction.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Appellate Division, First Department, Supreme Court of the State of New York.

Respectfully submitted,

Stephen Hochberg
30 Beekman Place
New York, N.Y. 10022
(212) 832-3543

Counsel for Petitioners

December , 1983

1a

ORDER OF THE NEW YORK STATE COURT OF
APPEALS DENYING LEAVE TO APPEAL

AT A SESSION OF THE COURT, HELD AT
COURT OF APPEALS HALL IN THE CITY
OF ALBANY ON THE TWENTY-NINTH DAY
OF SEPTEMBER A.D. 1983

PRESENT, Hon. Lawrence H. Cooke, Chief Judge Presiding

1 Mo. No. 802
Bache Halsey Stuart Shields
Incorporated,

Respondents,

vs.
Jose Harari, Salvador Harari
and Renee Harari,

Appellants.

A motion for leave to appeal to the Court of Appeals
in the above cause having been heretofore made upon the part
of the appellants herein and papers having been submitted
thereon and due deliberation thereupon, had, it is

ORDERED, that the said motion be and the same hereby
is denied with twenty dollars costs and necessary reproduc-
tion disbursements.

s/ Joseph W. Bellacosa

JOSEPH BELLACOSA
CLERK OF THE COURT

ORDER OF THE NEW YORK STATE COURT
OF APPEALS DISMISSING THE APPEAL,
SUA SPONTE

AT A SESSION OF THE COURT, HELD
AT COURT OF APPEALS HALL IN THE
CITY OF ALBANY ON THE SIXTEENTH
DAY OF JUNE, A.D. 1983

PRESENT HON. LAWRENCE H. COOKE, Chief Judge Presiding

1 Mo. No. 655 SSD 84
Bache Halsey Stuart Shields In-
corporated,
Respondent.

vs.
Jose Harari, Salvador Harari,
and Renee Harari,
Appellants.

The appellants having filed notice of appeal in the
above title and due consideration having been thereupon
had, it is

ORDERED, that the appeal be and the same hereby is
dismissed without costs, by the Court sua sponte, upon
the ground that no substantial constitutional question
is directly involved.

s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
CLERK OF THE COURT

ORDER OF THE APPELLATE DIVISION, FIRST
DEPARTMENT, OF THE SUPREME COURT OF THE
STATE OF NEW YORK AFFIRMING THE JUDGMENT
OF THE SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF NEW YORK

At a term of the Appellate
Division of the Supreme
Court held in and for the
FIRST JUDICIAL DEPARTMENT
in the County of New York on
MARCH 29, 1983

PRESENT Hon. Francis T. Murphy, Jr. Presiding Justice
Theodore R. Kupferman
Samuel J. Silverman
Arnold L. Fein
Fritz W. Alexander, II Justices

Bache Halsey Stuart Shields Incorpo-
rated,

Plaintiff-Respondent,
-against-

Jose Harari, Salvador Harari and
Renee Harari,

Defendants-Appellants

16271

An Appeal having been taken to this Court by the
defendants-appellants from the judgment of the Supreme
Court, New York County (Rubin, J.) entered on February
4, 1982, which awarded plaintiff, \$215,719.63 plus interest,
costs and disbursements against defendants, jointly and
severally, and dismissed all defendants' counterclaims,
and said appeal having been argued by Stephen Hochberg, of
counsel for the appellants, and by Joel M. Miller, of
counsel for the respondent; and due deliberation having had

thereon.

It is unanimously ordered that the judgment so
appealed from be and the same is hereby affirmed.
Plaintiff shall recover of defendants one bill of \$75.00
costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk

JUDGMENT OF THE SUPREME COURT OF THE
STATE OF NEW YORK, COUNTY OF NEW YORK
IN FAVOR OF RESPONDENTS

At a Trial Term, Part 64, of
the Supreme Court of the State
of New York, held in and for the
County of New York at the Court-
house, 60 Centre Street, New York
New York, on the 4th day of February
1982.

Judgment Appealed From
[A -4-A-6]

P R E S E N T :

Hon. Isreal Rubin
Justice

BACHE HALSEY STUART SHIELDS
INCORPORATED

Plaintiff

-against-

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI

Defendants.

x

:

:

:

:

:

:

:

:

:

:

x

Index No. 03116/80
Trial Term Part 64

JUDGMENT

The Issues in the above captioned action were
tried before Mr. Justice Sidney Asch, without a jury, at
Trial Term, Part 64, of this Court, on October 13, 14, 15,
16, 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30 and on
November 23 and 24, 1981.

Plaintiff Bache Halsey Stuart Shields Incorporated
appears by its attorneys, Miller, Wrubel & Dubroff, a

professional corporation. Defendants Jose Harari, Salvador Harari and Renee Harari appeared by their attorneys Vincenti & Schickler.

The Court (Hon. Sidney H. Asch) made and filed its decision in writing on December 31, 1981.

The Court found in favor of plaintiff Bache Halsey Stuart Shields Incorporated and against defendants Jose Harari, Salvador Harari and Renee Harari, Jointly and severally, and directed entry of judgment against those defendants, jointly and severally, in the aggregate amount of \$215, 719.63 as of September 30, 1981, plus interest to judgment.

The Court dismissed the defenses and counter-claims pleaded by defendants Jose Harari, Salvador Harari and Renee Harari.

NOW, on motion of Miller, Wrubel & Dubroff, a professional corporation, attorneys for plaintiff Bache Halsey Stuart Shields, Incorporated, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff Bache Halsey Stuart Shields Incorporated, residing at 100 Gold Street, New York, New York, recover of defendants Jose Harari, Salvador Harari and Renee Harari, residing at 161 Fuente de Las Aguilas,

Mexico City, Mexico, jointly and severally, the aggregate amount of Two Hundred Fifteen Thousand, Seven Hundred and and Nineteen Dollars 63/100 (\$215,719.63) as of September 30, 1981, plus interest to judgment in the sum of \$6,795.16 and costs and disbursements in the sum of \$5,414.00 as taxed, amounting in all to \$227,928.77 and that plaintiff Bache Halsey Stuart Shields Incorporated have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED, that the counter-claims of all defendants against plaintiff are dismissed

ENTER

(SIGNED PURSUANT TO 9002 CPLR)

J.S.C.

s/ NORMAN GOODMAN
NORMAN GOODMAN

FILED
FEBRUARY 4, 1982
COUNTY CLERK OFFICE
NEW YORK

MEMORANDUM DECISION OF SIDNEY H. ASCHE
JR.,

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 64

x

BACHE, HALSEY, STUART, SHIELDS INC.,
Plaintiff

-against-

INDEX
03116/80

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI,
Defendants

x

SIDNEY H. ASCH, J.:

This is an action brought by Bache, Halsey, Stuart, Shields, Inc, a brokerage firm, which is suing to recover damages in the principal sum of \$156,869.98 from defendants.

After a non-jury trial which lasted sixteen days, and required more than 2,000 pages of transcripts, with 59 exhibits received in evidence, the Court decided in favor of the plaintiff. The facts adduced clearly establish liability even if uncontroverted facts alone are examined and most certainly upon the resolution of those facts which were in dispute.

The threshold question relates to the jurisdiction of the Court. It seems clear that the Court does have in personam jurisdiction over the parties (CPLR 302 (a)(1)).

The facts indicate that the defendants had various securities and commodities dealings with the plaintiff in New York over a significant period of time. Furthermore, defendants agreed that with respect to their accounts that they would be "governed by the laws of the State of New York."

As a basis for securing credit from the plaintiff, the defendants referred plaintiff to their business relationship which they had maintained for sometime with the Chase Manhattan Bank.

Harari, in addition, stated that he had come to New York at various times to conduct several financial undertakings. Apparently the other defendants visited New York City in 1979 to open an account with the brokerage firm of Merrill Lynch, Pierce, Fenner & Smith. Defendant Harari also opened an account with Citibank in New York City, consisting of a checking account and a Certificate of Deposit in excess of \$100,000.00

In addition, defendants affirmatively have used New York as a forum for litigating their claims against plaintiff. By seeking affirmative relief, as defendants have done here, they have automatically subjected themselves to the in personam jurisdiction of the courts of this state (Flaks, Zaslow & Co. V. Bank Computer Network

Corp., 66 A D 2D 363). This disposes of the question of jurisdiction.

Another preliminary question relates to the fact that the court received into evidence various written agreements between the parties. Defendants objected on the grounds of CPLR Section 4544 which proscribes the admission of contracts printed in a small size type, if that agreement constitutes a "consumer transaction" defined as:

"A transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes" (underscoring added)

Mere perusal of the statute makes it clear that it is not applicable to the transaction which are involved in this litigation. The contention is for "personal, family or household purposes" simply because the parties are members of the same family is not persuasive. The courts of New York have applied this interpretation in restricting the application of the phrase "consumer transactions" in this way. (See, e.g. State v. Strong Oil Co., Inc., 105 Misc. 2d 803; Donnelly v. Mustang Pools, Inc., 84 Misc. 2d 28; cf. Recchio v. Mfrs. & Traders Trust Co., 35 A.D. 2d 769).

The critical legal doctrine which governs this case is that the obligation of a broker to his customer who is an experienced business man and who reserves

the final decisions as to investments for himself, is no more than merely carrying out the orders of the customer in good faith and also when requested, to advise him of facts which are significant. The evidence makes it clear that by January 1980, the defendants acting through Jose Harari, were experienced in trading commodity futures contracts. There was nothing brought out which indicates that the plaintiff did not execute defendants' orders in good faith or fail to supply all significant information.

Jose Harari was no business novice beguiled by the representations of the plaintiff. He was a substantial business man and had engaged in many transactions involving financing and real estate. He had invested hundreds of thousands of dollars in the Mexican stock market and had accumulated personal assets of more than \$2,000,000.00.

When the defendants opened the account through Jose Harari, the account executive for plaintiff told Jose Harari, of the possibility of a discretionary account by which the brokerage firm would decide as to appropriate purchases and sales. Harari specifically rejected this type of an account.

By written agreements, the defendants agreed with plaintiff: To maintain such margins as plaintiff in its

discretion may require; to pay on demand any debit balance; that plaintiff would have the right without prior demand to sell or buy securities or commodities contracts as necessary for plaintiff's protection; and that defendants' liability would be "joint and several".

The defendants also signed a Commodities Suitability Letter by which they represented that their "total net worth" was \$1,000,000.00 with "Total Net Liquid Assets " of \$400,000.00. They acknowledged that trading in commodities is "subject to rapid fluctuations" and presenting "inherent risks". Nevertheless, they assured plaintiff that trading in commodities was a "suitable trading vehicle" for them.

From the inception of this lengthy trial much emphasis was placed on the apparent inability of Jose Harari in the use and comprehension of English. Mr. Jose Harari nevertheless seemed to have a fair command of the language. And certainly none of the defendants expressed any difficulty in comprehending the contents of these documents nor did they ask for any assistance. In a commercial transaction such as

this between sophisticated and experienced parties, even if a signatory does not understand English where that party can obtain assistance but fails to request such, the law is clear that the party is not excused from the obligations imposed by the agreement. (See, *First National Bank of Odessa v. Fazzari*, 10 N.Y. 2d 394; *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 162-163; *James Talcott, Inc., v. Wilson Hosiert Co.*, 32 A.D. 2d 524; *Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc.* 30 A.D. 2d 952).

The defendants on their own sold short December 1980 Comex Gold Futures Contracts toward the end of 1979. They consistently maintained a net short position in their account although the plaintiff's account executive consistently recommended that the defendants liquidate their short positions or at least protect themselves by hedging. As a result, there was a substantial open loss in defendants' gold futures contracts stemming from defendants' own decision, to remain short December 1980 gold futures contracts.

At this time, Jose Harari communicated with the plaintiff's account executive several times a week. And during January 1980, at a time when the gold futures market was fluctuating wildly, the two consulted with

each other usually several times a day. Jose Harari admitted that the account executive reported everything to him and conceded that invariably between May 1978 and June 24, 1980, the account executive reported "all the transactions that were made in the account" before the transaction was executed and that following each transaction there was a report of the prices. There is no doubt that on the 14, 15, 16 and 17 of January 1980 when the gold futures market was turbulent, Jose Harari himself authorized every transaction. Although while testifying Harari claimed that he believed that he was being "protected" with respect to each transaction at the time that these transactions were actually taking place, it was beyond dispute that he knew about each transaction which caused losses and authorized each of these transactions. The defendants never indicated, until after this law suit was initiated that they would not furnish the additional money necessary to meet their deficient credit balance. As a matter of fact, at a meeting held on January 31, 1980, in Mexico City, Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York as collateral for payment. At a meeting

held February 8, 1980, in San Antonio, Harari acquiesced in the loss, stating "I accept the loss."

There are many cases which have held that where there is a chaotic market condition and the customer's account is in default, it is not unreasonable for the broker to liquidate the account without notice where the customer's agreement so provides. (*Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571; *Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc.* 500 F. Supp. 491; *Scheneck v. Bear, Stearns, & Co.*, 484 F. Supp. 937; *E.F. Hutton & Co., v. Burkholder*, 413 F. Supp. 852; *Fisch v. Banks*, 58 Misc. 2d 839).

This is the law in the First Department, (See, *Raisis v. Eisele & King, Libaire, Stout & Co.*, 20 A.D. 2d 392, *aff'd mem.* 16 N.Y. 2d 557; *Hirsch & Co., v. Pattiz*, 19 A.D. 2d 607).

On evaluation of the testimony and documents received in evidence, it has been amply established that the plaintiff fulfilled its obligations as as broker and the defendants have not succeeded in proving the allegations on which their defenses or counterclaims rest.

All through the trial, the defendants urged that certain clerical errors made by plaintiff should preclude recovery by plaintiff. But there was never any proof that there was error relied upon by the defendants causing any of the damages alleged. None of the errors were relied upon by either party and most were corrected very promptly. These errors were incidents of doing business in a confused and changeable commodities market. Moreover, defendants did not establish to the satisfaction of the Court, that plaintiff violated New York Stock Exchange Rule #405. In any event, any violation of its in-house rules is legally irrelevant.

Theories advanced by defendants as to fraud, the antifraud provisions of the Federal Securities and Commodities Laws, breach of warranty, conversion were inapposite or not established.

Accordingly, this Court awards judgment in favor of the plaintiff and against defendants, jointly and severally in the aggregate amount of \$215,719.63 as of September 30, 1981, plus interest to judgment and dismisses defendants' defenses and counterclaims. Settle judgment.

DATED , December 31, 1981

s/ _____
J.S.C.

ORDER OF HON. FRANK BLANGIARDO, J. GRANTING
PLAINTIFF'S MOTION FOR AN ORDER CONFIRMING THE
EX PARTE ORDER OF ATTACHMENT AND DENYING DEFEN-
DANTS' CROSS-MOTION TO VACATE SAID EX PARTE
ORDER OF ATTACHMENT

At a Special Term, Part I
of the Supreme Court of the
State of New York, Held in
and for the County of New
York, at the Courthouse
thereof 60 Centre Street,
New York, New York on the
22 day of April 1980.

P R E S E N T

Hon. Frank J. Blangiardo,
Justice

BACHE HALSEY STUART SHIELDS INC.

Plaintiff

Index No 03116/80

-against-

ORDER

JOSE HARARI, SALVADOR HARARI AND
RENEE HARARI,

Defendants

Plaintiff, Bache Halsey Stuart Shields, Inc.,
having moved for an order pursuant to CPLR § 6211,
confirming the ex parte Order of Attachment herein
dated February 15, 1980 and for such other relief as to
this Court shall seem just and proper; and defendants,
Jose Harari, Salvador Harari and Renee Harari, having
cross-moved for an order pursuant to CPLR § 6223
vacating the Order of Attachment.

Upon reading and filing: (i) the Order to Show Cause, dated February 20, 1980; (ii) the Affidavit of Frank Geremia, sworn to February 20, 1980, and the exhibits annexed thereto; (iii) the Affidavit of Jose Carabaza, sworn to March 14, 1980, and the exhibit annexed thereto; (iv) the Affidavit of Joel M. Miller, sworn to March 19, 1980, all in support of the Motion and in opposition to the Cross-Motion; and (v) the Affidavit of Renee Harari, sworn to March 6, 1980; (vi) the Affidavit of Jose Harari, sworn to March 6, 1980, and the exhibits annexed thereto; and (vii) the Affidavit of Mario Diaz-Cruz, III sworn to March 10, 1980, all in opposition to the Motion and in support of the Cross-Motion; and due deliberation having been had and the Court having rendered its decision in writing dated April 8, 1980;

NOW on the motion of Ullman, Miller & Wrubel, P.C. attorneys for plaintiff Bache Halsey Stuart Shields Incorporated it is hereby,

ORDERED that plaintiff's motion for an order confirming the ex parte Order of Attachment is granted; and it is further

19a

ORDERED that the defendants' cross-motion for an order vacating said ex parte Order of Attachment is denied.

E N T E R

J.S.C.

FILED

APRIL 25, 1980

MEMORANDUM DECISION OF BLANGIARDO J.

DECISION OF THE SUPREME COURT OF THE
STATE OF NEW YORK, COUNTY OF NEW YORK
CONFIRMING THE EX PARTE ORDER OF
ATTACHMENT

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

-----X

BACHE HALSEY STUART SHIELDS
INCORPORATED.

Plaintiff

-against-

Index No
03116/80
#130 3/20/80

JOSE HARARI, SALVADOR HARARI
AND RENEE HARARI

Defendant

_____X

BLANGIARDI, J. :

This is a motion by the plaintiff for an order confirming an ex parte order of attachment. Also the defendants have cross-moved for an order vacating the said attachment on the basis that this court lacks jurisdiction over the defendants and that the plaintiffs have failed to show a probability of success on the merits of their case while the

defendants possess valid counterclaims.

Plaintiff's motion is granted and the defendants' motion is denied. The attachment in this case does not offend "traditional notions of a fair play and substantial justice." (see *International Shoe Co. v. Washington*, 326 U.S. 310) since the defendants have established purposeful contacts with this jurisdiction in maintaining bank accounts here and having transactions carried out for them on the New York commodities and stock exchanges. Plaintiff has made an adequate demonstration of a likelihood of succeeding on its claims while this court forms no opinion as to the merits of the defendants' alleged counterclaims.

It is noted in possim that the parties have an agreement seemingly calling for the arbitration of disputes. Although the defendants have brought this to the court's attention they have not made an application for the stay of this action, Therefore, the court will make no ruling on the possible staying of this action at this time.

Settled order.

DATEDL April 8, 1980

J.S.C.

EX PARTE ORDER OF ATTACHMENT OF THE
SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF NEW YORK

At a Special Term
Part II, of the
Supreme Court of the
State of New York, held
in and for the County
of New York, at the Court-
house thereof at 60
Centre Street, on the
15th day of February 1980.

P R E S E N T

HON. PEGGY BERNHEIM
Justice.

BACHE HALSEY STUART SHIELDS,
INCORPORATED

Plaintiff

-against-

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI,

Defendants.

Index No. 03116/80

ORDER OF ATTACHMENT

-----x

A motion having been made by the plaintiff
Bache Halsey Stuart Shields Incorporated for an
Order of Attachment against the property of defen-
dants Jose Harari, Salvador Harari and Renee Harari,
in an action in the Supreme Court of the State of
New York, County of New York.

NOW, on reading the affidavit of Mark Molloy,
duly sworn to the 14th day of February, 1980, wherein
it appears a cause of action for a money judgment

exists in favor of plaintiff and against defendants, liable jointly and severally, for the sum stated in said affidavit and in the verified complaint herein, namely \$156,869.98 plus interest, costs and disbursements, and that plaintiff is entitled to recover said sum above all counterclaims known to it and it is probable that the plaintiff will succeed on the merits.

AND it further appearing that plaintiff is entitled to an Order of Attachment against the property of defendants in the sum of \$56,869.98

on the ground that each defendant is a non-domiciliary not residing within the State of New York and the undertaking required by law having been submitted herewith;

It is, on the motion of Ullman, Miller & Wrubel, P.C. attorneys for plaintiff

ORDERED that plaintiff's undertaking be, and the same hereby is, fixed in the sum of Thirty Four Thousand Eight Hundred and Eighty Five Dollars and Twelve Cents (\$34,885.12) of which amount the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents (\$8,721.28) is conditioned

that plaintiff will pay to defendant Jose Harari all costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally determined that plaintiff is not entitled to an attachment of defendants property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents (\$8,721.28) is conditioned that plaintiff will pay to defendant Salvador Harari all costs and damages which may be sustained by reason of the attachment if that defendant recovers judgment, or it if is finally determined that plaintiff is not entitled to an attachment of that defendant's property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents (\$8,721.28) is conditioned that plaintiff will pay to defendant Renee Harari all costs and damages which may be sustained by reason of the attachment if that defendant recovers judgment, or if it is finally determined that plaintiff is not entitled to an attachment of that defendant's property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents (\$8,721.28)

is conditioned that plaintiff will pay to the Sheriff all of his allowable fees; and it is further

ORDERED, that the amount to be secured by this Order of Attachment, including interest, costs and Sheriff's fees and expenses shall be, as against defendant Jose Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Cents (\$174,425.66) and, as against defendant Salvador Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Six Cents (\$174,425.66) and, as against defendant Renee Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Six Cents (\$174,425.66); and it is further

ORDERED that the Sheriff of the City of New York or the Sheriff of any county of the State of New York attach:

(a) property of Jose Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant in personal property or upon any debt owed to said defendant, and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars

and Sixty Six Cents (\$174,425.66).

(b) property of Salvador Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant, in personal property or upon any debt owed to said defendant, and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars and Sixty Six Cents (\$174,425.66) and

(c) property of Renee Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant, in personal property or upon any debt owed to said defendant and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars and Sixty Six Cents (\$174,425.66), provided that the total amount attached not exceed \$174,425.66 and that he hold and safely keep all such property and debts paid, delivered, transferred or assigned that may be granted against defendants in this action, and that he proceed herein in the manner required by law, and it is further

ORDERED that plaintiff shall move within
five days after levy hereunder on notice to
defendants, the garnishees, if any, and the
Sheriff making any levy herein for an order con-
firming this Order of Attachment.

E N T E R
WITHIN TEN DAYS

s/ PB
JUSTICE OF THE SUPREME COURT

ULLMAN, MILLER & WRUBEL. P.C.
Attorneys for Plaintiff
30 Rockefeller Plaza
New York, New York 10020
(212) 265 4200

I, Joan H. Gregory, an Attorney at Law
do hereby certify pursuant to Rule
2105 that *****

s/ Joan H. Gregory